SUPREME COURT OF ARIZONA

NEKO ANTHONY WILSON,

Petitioner,

v.

HON. ROBERT J. HIGGINS, Judge of the Superior Court of the State of Arizona in and for the County of Navajo,

Respondent Judge,

STATE OF ARIZONA, ex rel. Brad Carlyon, Navajo County Attorney,

Real Party in Interest.

No. CR–20–0254 PR

Court of Appeals
No. 1 CA–SA 20–0095

Navajo County Superior Court
No. CR2005–0518

AMICUS CURIAE BRIEF OF THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL IN SUPPORT OF REAL PARTY IN INTEREST STATE OF ARIZONA

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INTRODUCTION

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) represents approximately 900 state, county, and municipal prosecutors. APAAC's primary mission is to provide training to Arizona's prosecutors. Additionally, the agency works collaboratively with community and criminal justice stakeholders on a variety of policy and public issues. On occasion, pursuant to Rule 31.15 of the Arizona Rules of Criminal Procedure ("Rules"), APAAC submits amicus curiae briefs on issues of significant concern. This is such an occasion.

APAAC has a substantial interest in the proper interpretation and application of the Rules. When the Rules were comprehensively amended in 2018, prosecutors were part of the Task Force created by this Court, and APAAC thoroughly reviewed the Task Force's proposed amendments and provided comments and suggestions. Substantive changes were cautiously made during this process. In the opinion below, the court of appeals inferred this Court's intent in amending Rule 27.7 without even first examining the plain language of Rules 7.2 and 27.7 or the history of Rule 27.7's amendment. The opinion improperly created a substantive change when only a stylistic change was expressly intended by the Task Force. The opinion also leaves the trial courts and parties with no guidance on how release determinations are to be made when a petition to revoke probation is filed. For these reasons, APAAC joins with Real Party in Interest State of

Arizona in asking this Court to reverse the court of appeals' opinion and hold that the release determination of probationers pending a hearing on a petition to revoke probation continues to be governed by Rule 7.2(c), as it has been for decades, and that any substantive change must first go through the rule-making process.

ARGUMENT

I. History of the Rules Regarding Release Determination Upon the Filing of a Petition to Revoke Probation.

Arizona has long held that a determination of release after a petition to revoke probation has been filed must be made in accordance the rules of procedure governing release after conviction. *See State v. Arnold*, 24 Ariz. App. 529, 530 (1975); *see also McCleaf v. State*, 190 Ariz. 167, 171 n.2 (App. 1997) (citing *Arnold* and noting the directives in the rule "regarding release after conviction apply" for release determination pending probation revocation hearing); *State v. Superior Court*, 138 Ariz. 4, 6 (App. 1983) (same). In *Arnold*, the State sought special action relief in the court of appeals after a trial court had released a probationer on bond pending a hearing to revoke his probation without applying the applicable rules of procedure. 24 Ariz. App. at 530. At this time, Rule 27.6 provided that "at the initial appearance of a probationer after his arrest, a release determination under Rule 7.2(b) shall be made." *Id.* Rule 7.2(b), in turn, stated:

> b. After Conviction. After a person has been convicted of any offense for which he has or may suffer a sentence of imprisonment, he shall not be released on bail or on his own recognizance unless it is

> established that there are reasonable grounds to believe that the conviction may be set aside on a motion for new trial, reversed on appeal, or vacated in any post-conviction proceeding. The release of a person pending appeal shall be revoked if he fails to prosecute his appeal diligently.

Id. (quoting Ariz. R. Crim. P. 7.2(b) (West 1975)). The court of appeals held in *Arnold* that the trial court had improperly granted release because the probationer had not met his burden of establishing the requirements in Rule 7.2(b). *Id.*

The cross-reference to the rule governing a release determination ***after conviction*** had long been a part of Rule 27.6, which became Rule 27.7. *See* Arizona Supreme Court Order No. R–04–0033 (June 9, 2005) (renumbering Rule 27.6 to 27.7). This cross-reference makes sense. A person on probation has already been convicted of a crime, either by pleading guilty or a finding of guilt by a fact-finder (jury or judge). Instead of imposing a sentence, the trial court has instead suspended the imposition of a sentence and imposed a term of probation. *See State v. Muldoon*, 159 Ariz. 295, 298 (1988) ("Probation is not a sentence. …. Probation is a judicial order allowing a criminal defendant a period of time in which to perform certain conditions and thereby avoid imposition of a sentence."). If a defendant fails to satisfy probation conditions, a court "may vacate the order suspending the imposition of sentence, and then impose sentence, including such sanctions as it might have in the first instance." *Id.*

II. Amendments to the Rules in 2017

In December 2015, this Court created a Task Force "to restyle, simplify, and clarify" the Rules. Administrative Order No. 2015–123 (Dec. 16, 2015). The Task Force included ten judges, representatives from the superior court, four prosecutors, four criminal defense attorneys, a court clerk representative, and a law professor. Petition to Amend the Rules of Criminal Procedure No. R–17–0002, at 2 (Jan. 8, 2017). The Task Force broke into workgroups that met "more than sixty times," "reviewed the rules in depth," and "presented proposed revisions to the full Task Force." *Id.* at 4. The Task Force also met 12 times in 2016, and its work product represented "an investment of thousands of hours of its members' time." *Id.* at 4–5.

In its original petition to amend the Rules filed in January 2017, the Task Force set forth several general principles that it adhered to in proposing rule amendments, which included: "Substantive changes should be made cautiously, and only if a consensus exists in favor of it. If substantial disagreement exists over a proposed substantive change, it should be presented in a separate rule petition to permit a full airing of views focused just on that change." Petition No. R-17-0002, at 3–4. The Task Force also sought to avoid repetition and shorten the Rules in its stylistic revisions. *Id.* at 5.

At this time, Rule 27.7 provided:

> When a probationer is arrested on a warrant issued under Rule 27.6(b), his or her probation officer, if any, shall be notified immediately, and the probationer shall be taken without unreasonable delay before the court from which the warrant was issued, who shall advise the probation of his or her rights to counsel under Rule 6, inform the probationer that any statement he or she makes prior to the hearing may be used against him or her, set the date of the revocation hearing, and make a release determination under Rule 7.2(c).
>
> The petition proposed the following revised Rule 27.7:
>
> **(a) Probationer Arrested.** If a probationer is arrested on a warrant issued under Rule 27.6 or is arrested by the probationer's probation officer under A.R.S. § 13-901(D), the probationer must be taken without unreasonable delay to the court with jurisdiction over the probationer.
>
> **(b) Notice.** If a probationer is arrested on a warrant issued under Rule 27.6, the court must immediately notify the probationer's probation officer of the initial appearance.
>
> **(c) Procedure**. At the initial appearance, the court must advise the probationer of the probationer's right to counsel under Rule 6, inform the probationer that any statement the probationer makes before the hearing may be used against the probationer, set the date of the revocation arraignment, and make a release determination.

Petition No. R–17–0002, Appendix A, at 135. The Task Force explained that these revisions were intended to be "stylistic with two exceptions":

> (a) In proposed Rule 27.7(a), the Task Force proposes adding a reference to A.R.S. § 13–901(D) to address situations in which a probationer is arrested by the individual's probation officer.'
>
> (b) Also, in proposed Rule 27.7(b), the Task Force proposes to clarify that after a probationer is arrested on a warrant issued under Rule 27.6, the court is responsible for notifying the individual's probation officer of the initial appearance date.

Petition No. R–17–0002, Appendix B, at 43–44.

Several entities, organizations, and other interested parties filed comments, including APAAC.[1] The Phoenix City Prosecutor's Office submitted a comment and proposed, "[t]o ensure consistency with the current rule, the proposed version of 27.7(c) should add a reference to Rule 7.2(c) at the end of the sentence." Phoenix City Prosecutor's Office Comment re Petition to Amend ARCP, at 5 (Mar. 14, 2017). The Task Force responded:

> The problem is that Rule 7.2 does not provide any procedures for the conditions of release following an arrest on a probation violation, which is the general subject of Rule 27.7(c). The Task Force concluded that developing such procedures would entail a substantive change to the rule, and that merely cross-referencing Rule 7.2 would not serve any purpose. Consequently, the Task Force decided against reinstating the cross-reference to Rule 7.2 in Rule 27.7(c).

Supplemental Petition No. R–17–0002, at 26–27 (Apr. 25, 2017).

This Court adopted the proposed Rule 27.7, as provided above, effective January 1, 2018. Arizona Supreme Court Order No. R–17–0002 (Aug. 31, 2017), Attachment A, at 128.

III. The Court of Appeals Incorrectly Interpreted the Rules to Make a Stylistic Change Into a Substantive Change.

The court of appeals' interpretation of Rule 27.7 improperly turned a stylistic change into a substantive change. First, the court of appeals did not

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[1] APAAC's comments did not address the proposed changes to Rule 27.7. *See* APAAC Comment re Petition to Amend ARCP (Mar. 3, 2017).

properly interpret the plain language of the Rules. Second, even if the history of the Rules is considered, the history shows that the rule change was entirely stylistic and non-substantive. Any new substantive rule governing the determination of release for probationers when a petition to revoke probation has been filed should go through the normal rule-making process. For now, however, the only rule that applies is Rule 7.2(c), regardless of whether there is a reference to Rule 7.2(c) in Rule 27.7(c). Any other interpretation untethers this release determination from the Rules and creates confusion and non-uniformity in the trial courts of this State.

As set forth by Navajo County, this Court should not resort to other methods of construction and can apply the plain language of the Rules. Pet. for Rev., at 6–12; Navajo County Supp. Brief, at 3–10; *see also State v. Salazar-Mercado*, 234 Ariz. 590, 592, ¶ 4 (2014) ("If a rule's language is plain and unambiguous, we apply it as written without further analysis."). In other words, only if a rule's language is deemed ambiguous does this Court apply "secondary principles of construction, such as examining the rule's historical background, its spirit and purpose, and the effects and consequences of competing interpretations." *Salazar-Mercado*, 234 Ariz. at 592, ¶ 4. Even without the cross-reference to Rule 7.2(c) in Rule 27.7(c), Rule 7.2(c) is the only applicable rule because it broadly applies to all release determinations that occur "[a]fter [c]onviction."

But even if this Court were to find Rules 7.2 and 27.7's language ambiguous and resort to other methods of construction, it should still reverse the court of appeals' opinion. The court of appeals assumed that this Court intended a substantive change when deleting the cross-reference to Rule 7.2(c) in Rule 27.7(c), without examining the historical background of the amendment. *Wilson v. Higgins in and for County of Navajo*, ___Ariz. ___, 469 P.3d 481, ___, ¶ 14 (App. June 30, 2020). As discussed above, the deletion to the cross-reference to Rule 7.2(c) in Rule 27.7(c) was meant to be only a stylistic change. The Task Force spent hundreds of hours amending the rules and substantive changes were not lightly made. The opinion undermines this work by creating a substantive amendment when only a stylistic one was intended. *See Craig v. Craig*, 227 Ariz. 105, 107, ¶ 15 (2011) (stating a "dramatic" rule change "should occur through rulemaking, not through an opinion effectively rewriting [rules] and abandoning settled precedent").

The court of appeals also concluded that it was illogical to apply Rule 7.2(c) to probationers. *Wilson*, 469 P.3d at ___, ¶¶ 15–16. But this Rule has long been applied to probationers. *See McCleaf*, 190 Ariz. at 171 n.2; *Superior Court*, 138 Ariz. at 6; *Arnold*, 24 Ariz. App. at 530. The court of appeals erroneously focused on the fact that a probationer has not been "convicted of a violation" of probation conditions when a petition to revoke is filed. *See Wilson*, 469 P.3d at ___, ¶ 15.

But a person on probation has already been convicted of a crime and his or her sentence has been suspended. *See Muldoon*, 159 Ariz. at 298. A petition to revoke probation is not the filing of a new criminal offense; instead it is an allegation that "a probationer has violated a written condition or regulation of probation," Ariz. R. Crim. P. 27.6, which must be established "by a preponderance of the evidence," Ariz. R. Crim. P. 27.8(b)(3). If a probationer is found guilty of a probation violation, probation can be revoked and a sentence imposed for the original conviction, or probation may be modified or continued. Ariz. R. Crim. P. 27.8(c)(2). This is a significant difference from being charged with an entirely new criminal offense by complaint or indictment.[2] *See Gagnon v. Scarpelli*, 411 U.S. 781–82, 789 (1973) (distinguishing between criminal prosecution and revocation of probation, and concluding probationer has limited due process rights because he or she "has been convicted of a crime").

The court of appeals also stated it was illogical to apply Rule 7.2(c) to this circumstance because release would likely be limited for most probationers when the conditions in Rule 7.2(c)(1)(A) would rarely be met. *Wilson*, 469 P.3d at ___, ¶16. The court of appeals did not consider that Rule 7.2(c)(1) applies only if "the

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[2] Notably, if a petition to revoke is filed based upon the alleged commission of a new crime, a person would be entitled to a separate release determination under Rule 7.2(a) or (b) if charged for that crime.

defendant will, in all reasonable probability, receive a sentence of imprisonment." If a trial court is likely to grant probation and not a sentence of imprisonment, Rule 7.2(c)(1) would not prohibit release. *See State v. Kearney*, 206 Ariz. 547, 552, ¶ 15 (App. 2003) (concluding this Court intended the after conviction, pre-sentence release rule to "differentiate between those found guilty who will probably be granted probation from those who probably will not and to give a trial court discretion to release the former class of convicted persons pending sentencing in appropriate cases").

Moreover, a probationer has already been found guilty of a crime. After conviction, the right to release is limited because a defendant has been found guilty of a crime. *See, e.g.*, *Superior Court*, 138 Ariz. at 6–7 (recognizing limited "leeway for the trial judge" under rule governing release after conviction, noting purpose of rule is to "prevent a defendant who is waiting to be sentenced and who is surely going to prison, from committing further crimes during the interval"); *see also* A.R.S. § 13–3961.01 (permitting release post-conviction after a sentence of imprisonment has been imposed only if "the person in custody is in such physical condition that continued confinement would endanger his life"). Simply because it may be rare to obtain release after conviction when a sentence of imprisonment will likely be imposed, does not mean the rule is illogical. Instead, it provides for certain circumstances under which release after conviction would be permitted.

The court of appeals' interpretation also creates an absurd result. Now the release determination of probationers is completely untied to the Rules. This will create inconsistent results throughout the State of Arizona with no standards governing the release determination. This result was not intended by the stylistic amendment of Rule 27.7(c). Thus, the current Rule 7.2(c) should be applied (as it has for decades) and should only be modified through the rule-making process, which allows comments by various stakeholders to be considered by this Court.

CONCLUSION

APAAC respectfully urges this Court to reverse the court of appeals' opinion. The opinion below created an unintended substantive change to the Rules, without any consideration of the work of the Task Force or its stated intention regarding Rule 27.7(c). Further, the opinion creates an absurd result by changing decades of practice and creating confusion where none previously existed.

RESPECTFULLY SUBMITTED this 18th day of September, 2020.

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